

## CHAPTER 5

### DRIVING AND ACTUAL PHYSICAL CONTROL

#### 5.1 GENERALLY

#### 5.2 ACTUAL PHYSICAL CONTROL

#### 5.3 INOPERABLE VEHICLE

### 5.1 GENERALLY

Utah Code Ann. §41-6a-502 and §41-6a-517 make it unlawful for a person to “operate or be in actual, physical control of a motor vehicle” while impaired or with proscribed substances in the body.

“Operate” is not specifically defined by statute other than to state that an “Operator” means a person who is in actual physical control of a vehicle”. Utah Code Ann. §41-6a-102 (38).

Although actual physical control is not specifically designed by statute, the phrase was intended to expand the DUI prohibitions to persons not just driving under the influence, but also those who may not be driving, but who pose a significant risk of doing so.

### 5.2 ACTUAL PHYSICAL CONTROL

As “Actual Physical Control” is not a specifically defined statutory term, it has been the subject of a series of appellate decisions. In *State v. Bugger*, 483 P.2d 442 (Utah, 1971), the Utah Supreme Court first attempted to define the term and explain the standard for proving ACP:

That part of the statute which states: “be in actual physical control of any vehicle” has been before the courts of other jurisdictions which have statutes with similar wordings. The word “actual” has been

defined as meaning "existing in act or reality;\* \* \* in action or existence at the time being; present;\* \* \*." The word "physical" is defined as "bodily," and "control" is defined as "to exercise restraining or directing influence over; to dominate; regulate; hence, to hold from actions; to curb." The term in "actual physical control" in its ordinary sense means "existing" or "present bodily restraint, directing influence, domination or regulation." *Id.* at 443.

The Supreme Court further commented on the policy of the statute by stating in *Garcia v. Schwendiman*, 645 P.2d 651, 654 (Utah 1982) that,

as a matter of public policy and statutory construction, we believe that the "actual physical control" language of Utah's implied consent statute should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive occupants . . . .

Later, in *Richfield City v. Walker*, 790 P.2d 87 (Utah Ct. App. 1990), the Court of Appeals attempted to further define Actual Physical Control and adopted a totality of the circumstances and laid out a non-exclusive list of factors to examine in determine whether a defendant was in actual physical control of a vehicle:

A review of the relevant cases convinces us that we must look to the totality of the circumstances to determine whether defendant was in actual physical control of his vehicle. *Id.*, at 91

\* \* \*

Relevant factors for making this determination include, but are not limited to the following:

- (1) whether defendant was asleep or awake when discovered;
- (2) the position of the automobile;
- (3) whether the automobile's motor was running;
- (4) whether defendant was positioned in the driver's seat of the vehicle;
- (5) whether defendant was the vehicle's sole occupant;
- (6) whether defendant had possession of the ignition key;
- (7) defendant's apparent ability to start and move the vehicle;

- (8) how the car got to where it was found; and
- (9) whether defendant drove it there.

Remember that this is a *non-exclusive* list and that there may be factors and circumstances which tend to show actual physical control. In screening and prosecuting cases of this nature, prosecutors should be aware of the overall policy of APC and the needs of public safety.

Finally, the Supreme Court discussed the relevance of a defendant's intent, or lack thereof, to actually drive a vehicle. Instead, the court will focus on the *potentiality* of impaired driving in an effort to promote highway safety:

Whether or not a person has the subjective intent to subsequently operate a vehicle is irrelevant to the question of whether the person has the present ability to start and move the vehicle. It is therefore permissible for a trial court to find that a person had actual physical control over a vehicle even though the person did not subjectively intend to exercise it. *State v. Barnhart*, 850 P.2d 473, 479 (Utah Ct. App. 1993).

### 5.3 INOPERABLE VEHICLE

As counterintuitive as it may seem, a person may be in actual physical control of an inoperable vehicle. This is not to say that somebody sitting drunk in a rusted out hulk with no engine or wheels in their backyard is guilty of DUI, rather, it simply allows prosecutors to pursue cases where an individual has obviously driven a vehicle at some point which later becomes disabled.

In *Lopez v. Schwendiman*, 720 P.2d 778 (Utah 1986), the Utah Supreme Court held that an intoxicated motorist, asleep at the wheel in his inoperable truck, was in actual physical control of his vehicle.

The Utah Courts have followed the reasoning of the Washington Supreme Court's decision in *State v. Smelter*, 674 P.2d 690, 693 (Wash. 1984):

[The] focus should not be narrowly upon the mechanical condition of the car when it comes to rest, but upon the status of its occupant and the nature of the authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move. Where, as here, circumstantial evidence permits a legitimate inference that the car was where it was and was performing as it was because of the defendant's choice, it follows that the defendant was in actual physical control.

Thus, prosecutors should look to all of the surrounding factors in a DUI case to determine whether driving or actual physical control can be proven; keeping in mind that thoroughness and creativity are important skills in this area of DUI practice.

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